APPEAL NO. 92130
FILED MAY 21, 1992

A contested case hearing was held at _____, Texas, on January 22 and, pursuant to a request for continuance, on February 18, 1992, with (hearing officer) presiding as hearing officer. She determined that the respondent injured his back and right foot and ankle within the course and scope of his employment and was entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., arts. 8308-1.01 *et seq.* (Vernon Supp 1992) (1989 Act). The appellant finds fault with three of the hearing officer's findings of fact and one of her conclusions of law as being against the great weight and preponderance of the evidence. Appellant asks that we reverse and render a new decision or, in the alternative, reverse and remand for a new hearing.

DECISION

Finding some probative evidence to support the findings, conclusions and decision of the hearing officer, we affirm. Although we might very well have drawn different inferences from the evidence than those drawn by the hearing officer and have found them to be equally supported by the evidence, this is not, in and of itself, a sound basis to reverse a decision of the fact finder. Texas Workers' Compensation Commission Appeal No. 92113 (Docket No. FW/91-144699-01-CC-FW41) decided May 7, 1992, and authorities cited therein. There is evidence which can be said to reach the level of sufficiency to sustain the decision of the hearing officer.

The respondent testified that he injured his back, right side and ankle on (date of injury), when he caught his foot while taping a "side step Chevy truck" and fell on a concrete floor. This occurred on the job as he was taping the truck prior to its being painted. He states that no one was present when he fell but that a coworker came up just as he was picking himself up. He testified the coworker asked what had happened and that he told him he fell on his (backside). This happened about 3:00 to 3:30 p.m. and he finished the work day without telling his supervisor about the fall. Two other coworkers who rode home with him joked about the incident when he mentioned his back hurt. The respondent said his back hurt him that evening and was worse the next morning. He put on his uniform the next morning but, because of the soreness, he asked his girlfriend to take him to work so he could tell his boss and then take him to the hospital. He stated he told his boss, DB, about the fall and was told he wasn't needed anymore. After returning to his house for several hours, his girlfriend took him to a hospital emergency room. Over the next several months, he was seen by several other doctors culminating in medical opinions of degeneration of the lumbosacral disc with narrowing of the discs, slight posterior protrusion of the lower four lumbar intervertebral discs and tarsal tunnel syndrome in the right foot and ankle. One of the doctors indicated the foot/ankle injury was related to his fall on (date of injury). He uses a crutch on occasion, has and is undergoing physical therapy, and has been recommended for surgery on the right foot/ankle. Medical records relating to the respondent were admitted into evidence.

The respondent admitted to several felony convictions and acknowledged that he

was on parole. He denied that he was wrestling with another employee at about 4:00 p.m. on (date of injury). He also denied he did any work on cars at his home after (date of injury), specifically denied removing a transmission or motor.

The respondent's former girlfriend testified that when the respondent got home on the (date of injury) he told her that he had injured himself when he fell in the bed of a truck at work that day. She also testified that he was in pain that night and the next morning. She took him to work so he could tell his boss and then was to take him to the hospital. The reason they went home after he was terminated at about 7:45 to 8:00 a.m was because they didn't know which hospital to go to right away. She is the one who suggested the hospital the respondent finally went to at about noon. She stated the respondent was upset when he was terminated. She denied that she ever told anyone that the respondent's claim was a sham.

Several witnesses appearing on behalf of the appellant contradicted the testimony of the respondent. These coworkers testified generally that they worked close to the respondent the day of the alleged injury but that they did not see him fall, notice any indication of injury or hear the respondent say anything about being injured. They also stated they did not believe there was any truck in the shop on the day the respondent claims he was injured. They testified they saw the respondent wrestling with another employee around 3:30 to 4:00 p.m. on (date of injury).

Respondent's neighbor, Mr. H, testified that respondent did not work on any cars after (date of injury) and that respondent had told him on (date of injury) about his injury at work. He denied that he, Mr. H, had ever told anyone the respondent's claimed injury was just a "sham." He specifically denied calling the respondent's employer and saying the claim was a fraud and offering to testify in exchange for getting his car painted free.

A claims adjuster for the appellant was called as a witness and testified that he called Mr. H on August 15 and was told by Mr. H that the respondent lived next door to him, that he had seen the respondent lift a transmission and motor after (date of injury), and that the respondent was not injured on the job. Mr. H told the adjuster that he had called the respondent's employer and wanted to be a witness because the respondent had stolen some money from Mr. H's girlfriend.

The employer, DB, testified that he terminated the respondent on May 24, 1991, because of previous problems and customer complaints. When the respondent came in on May 24, DB had already pulled his time card which meant the respondent had to come to the office that morning and could not go directly to work. When the respondent came to the office that morning, DB testified that he did not mention anything about "an accident, injury, fall or anything else." He further stated the respondent did not appear to be injured or hurt and that he was not limping or walking out of the ordinary. He stated nothing was mentioned about going to the hospital and the first he knew about the claimed injury was when he got a call from the hospital later in the day indicating the respondent was alleging

he was injured on the job and inquiring about insurance coverage. He stated that after receiving the call from the hospital, he called his insurance company, the appellant in this case.

DB testified that he made an immediate inquiry of the other employees to determine if they knew anything about an accident or injury to the respondent. No one had any knowledge or information about the matter. DB also stated that on (date of injury) there was no "side step Chevy truck" in the shop and, according to his records (also admitted into evidence), only one truck was in the shop that week and it was out by May 21. DB stated that Mr. H called him several times and stated that the respondent's claim was a "big game" or a "sham" and then suggested he, Mr. H, get a free paint job. DB also testified that after May 24 he talked to the respondent's girlfriend, who also worked once every two weeks for DB, and was told the claimed injury was a sham and was thought up by Mr. H.

Mr. R, who works for a private investigator, testified that he conducted surveillance of the respondent on several occasions and took both photographs and a video of him. These pictures purport to show the respondent both using a crutch at one time and a golf club at another time to support himself. This witness opined that while he observed the respondent, the respondent did not appear to be injured to him, did not limp or really use the golf club for support. His identification of the respondent was based upon information from an informant and from a photograph taken at some distance.

Photographs of the respondent using a crutch were admitted into evidence. Also, the video, of dubious quality and questionable value, was admitted into evidence.

The respondent was recalled as a witness and testified that he was not the person depicted in the video and denied that he ever had a black coat like the one worn by the person in the video who was supposed to be the respondent.

With the evidence in this convoluted and conflicting posture, the hearing officer made the following findings with which the appellant takes issue:

FINDINGS OF FACT

4.Claimant sustained injury to his back as well as tarsal tunnel syndrome of the right foot and ankle.

5.Claimant did fall at his work site (date of injury), while taping a vehicle in preparation for it to be painted at the paint and body shop.

6.Claimant was injured at the work site on (date of injury).

CONCLUSIONS OF LAW

2.Claimant's injury to his back and right foot and ankle occurred within the course and scope of his employment.

To make these findings, the hearing officer had to believe the testimony of the respondent and disbelieve the testimony of other witnesses appearing on behalf of the appellant. This she was within her authority to do. Article 8308-6-34(e) 1989 Act. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). We can not determine, as a matter of law, that the testimony of the respondent was so unbelievable or contradictory that it should be totally discarded. *See generally* State v. Lackey, 576 S.W.2d 685 (Tex. Civ. App.-San Antonio 1979, writ ref'd n.r.e.). As we indicated, while the evidence of record may well give equal support to inferences and conclusions different from those drawn by the hearing officer, this is not sufficient reason to reverse. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). While the evidence contrary to the determinations of the hearing officer was considerable, it is not of such great weight or of a preponderate level as to mandate reversal on a sufficiency of evidence standard. *See* In Re Kings Estate, 244 S.W.2d 660 (Tex 1951); Cain V. Bain, 709 S.W.2d 175 (Tex 1986).

The findings, conclusions and decision of the hearing officer are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge